

OPEN MEETING ITEM



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Executive Director

COMMISSIONERS
KRISTIN K. MAYES - Chairman
GARY PIERCE
PAUL NEWMAN
SANDRA D. KENNEDY
BOB STUMP



ARIZONA CORPORATION COMMISSION

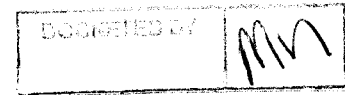
DATE: AUGUST 7, 2009
DOCKET NOS: W-02056A-03-0490

Arizona Corporation Commission

DOCKETED

AUG - 7 2009

TO ALL PARTIES:



Enclosed please find the recommendation of Administrative Law Marc E. Stern. The recommendation has been filed in the form of an Opinion and Order on:

**WILHOIT WATER COMPANY
(TRANSFER PORTION OF ASSETS/CANCEL PORTION OF CC&N)**

Pursuant to A.A.C. R14-3-110(B), you may file exceptions to the recommendation of the Administrative Law Judge by filing an original and thirteen (13) copies of the exceptions with the Commission's Docket Control at the address listed below by **4:00** p.m. on or before:

AUGUST 17, 2009

The enclosed is NOT an order of the Commission, but a recommendation of the Administrative Law Judge to the Commissioners. Consideration of this matter has tentatively been scheduled for the Commission's Open Meeting to be held on:

AUGUST 25, 2009 and AUGUST 26, 2009

For more information, you may contact Docket Control at (602) 542-3477 or the Hearing Division at (602) 542-4250. For information about the Open Meeting, contact the Executive Director's Office at (602) 542-3931.

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AZ CORP COMMISSION
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ERNEST G. JOHNSON
EXECUTIVE DIRECTOR

1 **BEFORE THE ARIZONA CORPORATION COMMISSION**

2 **COMMISSIONERS**

3 KRISTIN K. MAYES, Chairman
4 GARY PIERCE
5 PAUL NEWMAN
6 SANDRA D. KENNEDY
7 BOB STUMP

8 IN THE MATTER OF THE APPLICATION OF
9 WILHOIT WATER COMPANY FOR APPROVAL
10 OF THE TRANSFER OF A PORTION OF ITS
11 ASSETS AND CANCELLATION OF A PORTION
12 OF ITS CERTIFICATE OF CONVENIENCE AND
13 NECESSITY.

DOCKET NO. W-02065A-03-0490

DECISION NO. _____

OPINION AND ORDER

10 DATE OF HEARING:

December 1, 2003

11 PLACE OF HEARING:

Phoenix, Arizona

12 ADMINISTRATIVE LAW JUDGE:

Amanda Pope¹

13 APPEARANCES:

Mr. Douglas G. Martin, Martin & Bell, LLC, on
behalf of Wilhoit Water Company;

Ms. Carolyn Kusian Oberholtzer, Jorden,
Bischoff, McGuire & Rose, P.L.C., on behalf of
the City of Avondale; and

Mr. David Ronald, Staff Attorney, Legal
Division, on behalf of the Utilities Division of
the Arizona Corporation Commission.

19 **BY THE COMMISSION:**

20 On July 16, 2003, Wilhoit Water Company ("Wilhoit" or "Company") filed an application
21 with the Commission for approval of the sale of that portion of its water company assets that are
22 utilized to service the Glenarm Farms water system to the City of Avondale ("Avondale") and
23 cancellation of that portion of its Certificate of Convenience and Necessity ("CC&N" or
24 "Certificate") authorizing the provision of water services to the Glenarm Farms system
25 ("Application").

26 _____
27 ¹ This update to Judge Pope's Recommended Opinion and Order was prepared by Administrative Law Judge Marc E.
28 Stern who presided over another proceeding which involved this Company in Docket No. W-02065A-07-0306, *et al.*
resulting in Decision No. 71234 (August 6, 2009) in which documentation was filed which satisfied the conditions set
forth in the initial Recommended Opinion and Order in this proceeding.

1 By Procedural Order dated August 25, 2003, the Application was deemed administratively
2 complete pursuant to Arizona Administrative Code ("A.A.C.") R14-2-411(C) and Arizona Revised
3 Statutes ("A.R.S.") § 41-1074(C), and the matter was set for hearing on October 22, 2003.

4 Wilhoit published notice of the sale and cancellation in *Arizona Capital Times* on September
5 5, 2003 and filed an affidavit of publication on September 17, 2003. No requests for intervention
6 were filed.

7 Commission Utilities Division Staff ("Staff") filed a Staff Report on October 7, 2003
8 recommending conditional approval of the Application.

9 On October 22, 2003, a full public hearing was convened before a duly authorized
10 Administrative Law Judge of the Commission. Counsel for the Company, Staff, and the City of
11 Avondale appeared. No members of the public appeared at the hearing. The hearing adjourned, and
12 it was ordered that the hearing be continued to a later date so that the Company could provide a
13 witness capable of testifying to the underlying issues related to its Application, including but not
14 limited to an outstanding tax matter, as well as to address the argument raised by the City of
15 Avondale relating to the manner in which the outstanding tax is extinguished by operation of law.

16 On October 23, 2003, a procedural order was issued setting the hearing for December 1, 2003,
17 specifying the information, both documentary and testimonial, to be provided by Wilhoit at that
18 hearing and suspending the time clock for processing the Application during the pendency of the
19 continuance.

20 On December 1, 2003, the hearing convened and the Company, Staff, and the City of
21 Avondale appeared with counsel.

22 By its Application, Wilhoit seeks approval to sell that portion of its water company assets
23 utilized to service its Glenarm Farms water system. The Glenarm Farms system, one of four water
24 systems operated by Wilhoit,² served approximately 143 connections in the Avondale area.

25 The assets that were the subject of the sale at issue were encumbered by tax liens totaling
26 approximately \$215,000, inclusive of interest. Staff had recommended that the Company file
27 evidence that the outstanding personal property tax obligation would be paid before the close of

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² Wilhoit also operates the Yavapai Estates, Blue Hills, and Thunderbird Meadows water systems.

1 escrow. Avondale had argued that the delinquent taxes would be extinguished upon the sale of the
2 Company's assets, but Staff argued that Avondale was required to pay delinquent property taxes
3 attached to the property that they were to acquire. In fact, according to the testimony of an Avondale
4 witness in the sale proceeding, Avondale had already begun to provide service to the Company's
5 former customers in the Glenarm Farms service area in approximately September 2003.

6 On January 7, 2004, the initial Recommended Opinion and Order in this proceeding was
7 issued which conditioned approval of the sale of assets and cancellation of the Company's Certificate
8 for the Glenarm Farms service area with filing of evidence showing that the outstanding tax liens
9 totaling \$214,065.14 would be satisfied before the close of escrow or within 30 days of the effective
10 date of the Decision, whichever occurred first. Subsequently, the matter was pulled from the
11 Commission's Open Meeting agenda at the request of the Company. Although the Company ignored
12 previous requests by Staff for information concerning the transaction, while several other cases of the
13 Company were pending in Docket No. W-02065A-07-0306, *et al*, the Company responded to a data
14 request providing a copy of its sales agreement with Avondale dated July 3, 2003, and indicating that
15 the sale consummated on September 10, 2004. However, Avondale's attorneys had been unable to
16 resolve the delinquent tax issue until only recently.

17 On April 6, 2009, the Company filed a supplemental report in Docket No. W-02065A-07-
18 0306, *et al*. which contains, as an exhibit, a copy of a letter dated April 1, 2009, from Avondale's
19 attorney to the Commission's Chief of Consumer Services, stating that Avondale was awaiting the
20 approval of an abatement resolution by the Maricopa County Board of Supervisors to settle the
21 outstanding tax delinquency for \$50,000. Additionally, a separate exhibit to the Company's
22 supplemental report contained certification from the vice president of the Company indicating that
23 the remaining conditions required by the initial Recommended Opinion and Order have all been
24 satisfied as follows: that the Company refund any outstanding customer deposits; that the Company
25 refund any outstanding main extension agreements; and that the Company file a copy of a backflow
26 prevention tariff for each of its three other operating systems.

27 Further, in the Supplemental Staff Report filed in Docket No. W-02065A-07-0306, *et al.*,
28 Staff indicated that it has confirmed that Avondale had assumed the Company's liability to Maricopa

County for the delinquent taxes and Staff had received a copy of Avondale's letter of transmittal that was sent to the Maricopa County Treasurer and included a \$50,000 check as payment for all back taxes.

On July 13, 2009, the Company filed in Docket No. W-02065A-07-0306, *et al.* a copy of the Maricopa County Board of Supervisors' agenda which confirmed their approval of Avondale's Request for Compromise and Discharge for property taxes formerly owed by the Company for its Glenarm Farms water system.

Under the circumstances, since the Company has now met the conditions recommended by Staff for our approval of sale of the Company's assets and the cancellation of that portion of its Certificate related to its Glenarm Farms water system, the Application should be approved.

* * * * *

Having considered the entire record herein and being fully advised in the premises, the Arizona Corporation Commission ("Commission") finds, concludes, and orders that:

FINDINGS OF FACT

1. Wilhoit is an Arizona corporation certificated, pursuant to Decision No. 39691 (October 24, 1968), to provide water service to the following separate unconnected systems:

- a. Yavapai Estates – located in Chino Valley, Yavapai County;
- b. Blue Hills – located in the town of Dewy, Yavapai County;
- c. Thunderbird Meadows – located in Wilhoit, Yavapai County; and
- d. Glenarm Farms – located in Avondale, Maricopa County.³

2. The Company serves approximately 410 customers, with approximately 143 connections being served by the Glenarm Farms system.

3. On July 1, 2003, under threat of condemnation by Avondale, Wilhoit and Avondale entered into a Purchase and Sale Agreement between the City of Avondale and Wilhoit Water Company ("Agreement"). Under the Agreement, Avondale was to obtain all of the water transmission, distribution, and service facilities dedicated to the Glenarm Farms system as well as

³ In Decision No. 63153 (November 16, 2000), the Commission deleted approximately 163 acres of Wilhoit's Glenarm Farms CC&N to facilitate a new development receiving service from the City of Peoria.

1 any easements useful or necessary to the operation of the system and serve all of the existing Wilhoit
2 customers currently being served by the Glenarm Farms system.

3 4. Under the Agreement, Avondale would pay Wilhoit the sum of \$350,000, \$24,900 of
4 which has been deposited as earnest money and \$325,100 of which was to be paid on or before the
5 close of the transaction.

6 5. On July 16, 2003, Wilhoit filed the Application requesting approval for the sale of that
7 portion of its water company assets that are utilized to service the Glenarm Farms water system to
8 Avondale and for the cancellation of that portion of its CC&N authorizing the provision of water
9 services to the Glenarm Farms water system, the legal description of which is marked Exhibit "A"
10 attached hereto and incorporated herein by reference.

11 6. By Procedural Order issued on August 25, 2003, the Application was deemed
12 administratively complete and a hearing was set for October 22, 2003.

13 7. On October 7, 2003, Staff filed its report recommending conditional approval of the
14 sale and cancellation of the Company's CC&N for the Glenarm Farms area.

15 8. According to Wilhoit and Avondale, at the time of the Application, the Company
16 owed \$214,065.54 in delinquent personal property taxes originally assessed on Wilhoit's Glenarm
17 Farms water system that is the subject of this asset transfer.

18 9. The Company collected property tax expenses from its customers in the Glenarm
19 Farms service area in its rates and charges.

20 10. Neither Wilhoit nor Avondale cited to specific terms of the Agreement as setting forth
21 the party responsible for payment of the delinquent personal property taxes.

22 11. Wilhoit had outstanding customer deposits, which were, pursuant to the Agreement, to
23 be refunded prior to the close of escrow.

24 12. According to the Application, Wilhoit had outstanding main extension agreements,
25 which were, pursuant to the Agreement, to be refunded at the close of escrow.⁴

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28 ⁴ Wilhoit's Application indicated that there were main extension agreements to be refunded and that such refunds would be made at the close of the transaction. At the hearing, Staff testified that there were no main extension agreements to be refunded.

13. Staff stated that the Glenarm Farms water system was regulated by the Maricopa County Environmental Services Department Compliance ("MCESD"), which reported on August 26, 2003 that the Glenarm Farms water system was currently delivering water that met the water quality standards required by the A.A.C., Title 18, Chapter 4. MCESD also reported that the system had monitoring deficiencies, but no compliance or enforcement action was pending.

14. Staff recommended approval of Wilhoit's Application conditioned upon the following:

- a. that Wilhoit file with the Director of the Utilities Division evidence that the State of Arizona will be paid \$294,527.46 to satisfy the certificates of purchase related to outstanding personal property taxes of the Company before close of escrow, or within 30 days of any decision in this matter, whichever comes first;
- b. that Wilhoit file a Backflow Prevention Tariff for each of its other operating systems within 60 days of any decision in this matter; and
- c. that Wilhoit file a Curtailment Tariff for each of its other operating systems within 60 days of any decision in this matter.

15. In its December 10, 2003 filing, Staff indicated that Wilhoit has satisfied its recommendation with regard to filing a Curtailment Tariff.

16. The initial Recommended Opinion and Order ordered that the Company's Application be approved conditioned upon the following: that Wilhoit pay the outstanding tax liens calculated to equal \$214,065.54 as of January 31, 2004; that Wilhoit refund any outstanding customer deposits; that Wilhoit refund any outstanding main extension agreements; and that Wilhoit file Backflow Prevention Tariffs for its remaining three operating systems.

17. The Commission takes official notice of Wilhoit's and Staff's filings in Docket No. W-02065A-07-0306, *et al.* which establish that the above conditions have been satisfied.

18. Accordingly, Wilhoit's Application for approval of the sale of its assets to Avondale and the cancellation of that portion of its Certificate described in Exhibit "A" should be approved.

CONCLUSIONS OF LAW

1. Wilhoit is a public service corporation within the meaning of Article XV of the Arizona Constitution and A.R.S. §§ 40-281, 40-282 and 40-285.

2. The Commission has jurisdiction over Wilhoit and the subject matter of its Application.

1 3. Notice of the Application was given in accordance with the law.

2 4. There is a continuing need for water utility service in Wilhoit's Glenarm Farms
3 certificated area.

4 5. The City of Avondale is a fit and proper entity to acquire and operate the assets of
5 Wilhoit's Glenarm Farms system and provide water service to Wilhoit's Glenarm Farms customers.

6 6. It is in the public interest for the City of Avondale to acquire and operate the Glenarm
7 Farms assets of Wilhoit.

8 7. Wilhoit's Application herein should be approved without any conditions.

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ORDER

IT IS THEREFORE ORDERED that Wilhoit Water Company's application to sell that portion of its assets utilized to service the Glenarm Farms water system to the City of Avondale is hereby approved.

IT IS FURTHER ORDERED that the portion of Wilhoit Water Company's Certificate of Convenience and Necessity authorizing the provision of water services to the Glenarm Farms system as described in Exhibit "A" shall be canceled without further Order of the Commission.

IT IS FURTHER ORDERED that this Decision shall become effective immediately.

BY ORDER OF THE ARIZONA CORPORATION COMMISSION.

CHAIRMAN

COMMISSIONER

COMMISSIONER

COMMISSIONER

COMMISSIONER

IN WITNESS WHEREOF, I, ERNEST G. JOHNSON, Executive Secretary of the Arizona Corporation Commission, have hereunto set my hand and caused the official seal of the Commission to be affixed at the Capitol, in the City of Phoenix, this ____ day of _____, 2009.

ERNEST G. JOHNSON
EXECUTIVE SECRETARY

DISSENT _____

DISSENT _____

MES:db

1 SERVICE LIST FOR: WILHOIT WATER COMPANY

2 DOCKET NO.: W-02056A-03-0490

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Phoenix, Arizona 85004
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Utilities Division
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EXHIBIT "A"

The SW ¼ of Sec. 29, T2N, R1E, G&SRB&M, Maricopa County, Arizona;
EXCEPT the North 30' of the West 60' of the East 160' thereof.